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## PART B: HUMAN RIGHTS NEWS

### I INTERNATIONAL CRIMINAL COURT

ELINOR FRY\*

The International Criminal Court (ICC) has a new Chief Prosecutor. Succeeding her controversial former boss Luis Moreno-Ocampo, Gambian lawyer Fatou Bensouda began her solemn undertaking and officially took office on 15 June 2012.<sup>1</sup> Bensouda, the Court's former Deputy Prosecutor, has set out a number of goals to be pursued during her nine-year term, which include improving the quality and efficiency of investigations, ensuring violence against children and sexual and gender crimes are fairly represented in charges, and improving the Court's relationship with Africa.<sup>2</sup> On 11 September 2012, she submitted the names of the three candidates she was nominating for her previous position to the Assembly of States Parties. In the running for Deputy Prosecutor are: Ms. Raija Toiviainen (Finland), Mr. Paul Rutledge (Australia), and Mr. James Stewart (Canada).<sup>3</sup>

Bensouda's term commenced in the midst of hard times for the ICC. In the Libyan situation, tensions between the Court and Libya increased when Libyan authorities detained four ICC staff members of the Court's Office of Public Counsel for the Defence on 7 June 2012 after a visit to their client Saif al-Islam Gaddafi in the Libyan city Zintan.<sup>4</sup> Libya accused one of the four staff members, lawyer Melinda Taylor, of smuggling spying devices and a coded letter to Saif al-Islam.<sup>5</sup> Taylor denied the accusations. The staff members were released nearly a month later on 2 July 2012, and

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<sup>1</sup> International Criminal Court, Press Release ICC-CPI-20120615-PR811 (15 June 2012), *available at*: [www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr811](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr811) (last visited 2 October 2012).

<sup>2</sup> Hirsch, A., 'Fatou Bensouda: the Woman who could Redeem the International Criminal Court', *Guardian*, 14 June 2012, *available at*: [www.guardian.co.uk/law/2012/jun/14/fatou-bensouda-international-criminal-court](http://www.guardian.co.uk/law/2012/jun/14/fatou-bensouda-international-criminal-court) (last visited 2 October 2012).

<sup>3</sup> International Criminal Court, Press Release ICC-OTP-20120911-PR835 (11 September 2012), *available at*: [www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr835](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr835) (last visited 2 October 2012). (The Assembly has elected the new Deputy Prosecutor during its 11th Session in November 2012. However, at the time of writing in October 2012, the new Deputy Prosecutor was not yet announced.).

<sup>4</sup> International Criminal Court, Press Release ICC-CPI-20120609-PR805 (9 June 2012), *available at*: [www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr805](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr805) (last visited 2 October 2012).

<sup>5</sup> Harding, L., Borger, J., and Stephen, C., 'Libya Accuses Australian ICC Official of Passing Secret Letter to Gaddafi's Son', *Guardian*, 25 June 2012, *available at*: [www.guardian.co.uk/world/2012/jun/25/melinda-taylor-libya-accuse-spying](http://www.guardian.co.uk/world/2012/jun/25/melinda-taylor-libya-accuse-spying) (last visited 2 October 2012).

traveled back to The Hague on the same day.<sup>6</sup> Although Libyan authorities maintained that Taylor had committed a serious crime, they claimed her and her colleagues' release, negotiated by ICC President Sang-Hyun Song, was a 'humanitarian' gesture.<sup>7</sup>

In the past few months, litigation in the Libyan situation centered on Libya's Article 19 Application in light of Saif al-Islam Gaddafi's case.<sup>8</sup> Saif al-Islam, son of Libya's former leader Muammar Gaddafi, was captured by Libyan authorities on 19 November 2011, and has been in detention in Zintan ever since. Libya has made it clear from the outset that it wants to try Saif al-Islam in Libya, and thereto, it formally filed its Article 19 Application challenging the case's admissibility before the ICC on 1 May 2012.<sup>9</sup> The Prosecution and the Defence both filed responses, but the arrest and detention of the four ICC staff members in Zintan caused some delay in the proceedings. Pre-Trial Chamber I heard all parties on the matter on 9 and 10 October 2012, but the Judges are yet to render a decision on the admissibility of the case.

One of the concerns raised in relation to the admissibility challenge is whether Libya's government in Tripoli can be regarded as 'able to obtain the accused' in the sense of Article 17(3) of the Rome Statute, since Saif al-Islam is still being held by Zintan militia who want to try Saif al-Islam in Zintan instead of handing him over to authorities in Tripoli.<sup>10</sup> Another issue that has been addressed by the Prosecution and the Defence in their response briefs, as well as touched upon by Libya in its Article 19 Application, is whether a possible lack of domestic due process rights makes a case admissible before the ICC. The Prosecution and Libya's government argued that based on a strict reading of Article 17 of the Rome Statute, fair trial rights, although surely safeguarded in Libya, should not play a role in the admissibility determination the Pre-Trial Chamber needs to make.<sup>11</sup> The Defence argued differently, pointing to the

<sup>6</sup> International Criminal Court, Press Release ICC-CPI-20120702-PR820 (2 July 2012), available at: [www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr820](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr820) (last visited 3 October 2012); Harding, L. and Borger, J., 'Libya Frees International Criminal Court Legal Team Accused of Spying', *Guardian*, 2 July 2012, available at: [www.guardian.co.uk/world/2012/jul/02/libya-releases-icc-officials](http://www.guardian.co.uk/world/2012/jul/02/libya-releases-icc-officials) (last visited 3 October 2012).

<sup>7</sup> *Idem*.

<sup>8</sup> Article 19(2) of the Rome Statute reads, in relevant part: 'Challenges to the admissibility of a case on the grounds referred to in Article 17 or challenges to the jurisdiction of the Court may be made by: (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted.'

<sup>9</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, Pre-Trial Chamber I, Case No. ICC-01/11-01/11, 1 May 2012.

<sup>10</sup> Heller, K.J., 'Is Libya "Able" to Prosecute Saif and Al-Senussi?', *Opinio Juris*, 3 May 2012, available at: <http://opiniojuris.org/2012/05/03/is-libya-able-to-prosecute-saif-and-al-senussi/> (last visited 8 October 2012).

<sup>11</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, Pre-Trial Chamber I, Case No. ICC-01/11-01/11, 1 May 2012, para. 99; *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Prosecution Response to Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, Pre-Trial Chamber I, Case No. ICC-01/11-01/11, 5 June 2012, paras. 27-32.

lack of fair trial rights for Saif al-Islam in Zintan, as well as the likelihood of him receiving the death penalty upon conviction, and making the case for how fair trial considerations indeed play a role in admissibility determinations.<sup>12</sup>

In the meantime, Libya had scheduled Saif al-Islam's local trial to begin in September, but that trial has been postponed for five months due to the arrival of Abdullah al-Senussi, Libya's former intelligence chief and the second suspect in the ICC's investigation into the Libya situation.<sup>13</sup> Senussi had been arrested at Nouakchott airport in Mauritania on 17 March 2012, and had remained in detention there creating a tug of war for his custody between the ICC, Libya, and France (France had also requested Senussi's extradition in relation to a 1989 airplane bombing).<sup>14</sup> Mauritania eventually extradited Senussi to Libya on 5 September 2012.<sup>15</sup> Allegedly, Libya paid Mauritania 200 million US dollars for the transfer.<sup>16</sup> Regardless of having already filed an Article 19 Application with respect to Saif al-Islam's case, Libyan authorities will need to file a new Article 19 Application in relation to Senussi's case; Pre-Trial Chamber I had previously confined the ongoing litigation on the admissibility challenge to Saif al-Islam's case as he was the only one in Libya's custody.<sup>17</sup>

In the Democratic Republic of the Congo (DRC) situation, the first case concluded by the ICC, which has been praised as a milestone, also brought us the Court's first sentence decision and first decision on reparations for victims. Thomas Lubanga Dyilo, found guilty in March 2012 of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities in the DRC, was sentenced to 14 years of imprisonment on 10 July 2012.<sup>18</sup> With time

<sup>12</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Public Redacted Version of the Corrigendum to the Defence Response to the Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, Pre-Trial Chamber I, Case No. ICC-01/11-01/11, 31 July 2012, paras. 37–66. For a more in-depth discussion of the possible role played by fair trial rights in admissibility determinations see Fry, E., 'Between Show Trials and Sham Prosecutions: The Rome Statute's Potential Effect on Domestic Due Process Protections', *Criminal Law Forum*, Vol. 23, No. 1–3, 2012, pp. 35–62.

<sup>13</sup> Paulsworth, S., 'Libya to Delay Trial for Gaddafi's Son for Five Months', *Jurist*, 10 September 2012, available at: <http://jurist.org/paperchase/2012/09/libya-to-delay-trial-for-gaddafis-son-for-five-months.php> (last visited 3 October 2012).

<sup>14</sup> Prieur, L. and Al Shachi, H., 'Mauritania Agrees to Senussi Extradition, Libya says', *Reuters*, 20 March 2012, available at: [www.reuters.com/article/2012/03/20/us-libya-senussi-idUSBRE82J0X120120320](http://www.reuters.com/article/2012/03/20/us-libya-senussi-idUSBRE82J0X120120320) (last visited 3 October 2012).

<sup>15</sup> Cosgrove, M., 'Mauritania extradites Libya ex-intelligence chief', *Jurist*, 5 September 2012, available at: <http://jurist.org/paperchase/2012/09/mauritania-extradites-libya-ex-intelligence-chief.php> (last visited 3 October 2012).

<sup>16</sup> Kersten, M., 'Buying Justice: The Cost of Justice in Libya', *Justice in Conflict*, 10 September 2012, available at: <http://justiceinconflict.org/2012/09/10/buying-justice-the-cost-of-justice-in-libya/> (last visited 3 October 2012).

<sup>17</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the Conduct of the Proceedings Following the Application on Behalf of the Government of Libya Pursuant to Article 19 of the Statute, Pre-Trial Chamber I, Case No. ICC-01/11-01/11, 4 May 2012, para. 8.

<sup>18</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on Sentence Pursuant to Article 76 of the Statute, Trial Chamber I, Case No. ICC-01/04-01/06, 10 July 2012.

served, Lubanga will serve 8 years in prison unless the sentence is appealed. The Prosecution had asked for 30 years, but given the relatively narrow, yet easy to prove, charges, the sentence is generally regarded as proportionate and in accordance with Article 78 of the Rome Statute.<sup>19</sup>

The Trial Chamber issued its *Decision establishing the principles and procedures to be applied to reparations* separately, on 7 August 2012.<sup>20</sup> Trial Chamber I specified that the child soldiers victimized by Lubanga will receive reparations from the Trust Fund for Victims (TFV), created by the Assembly of States Parties to the Rome Statute, and not directly from Lubanga. Further administration and actual reparations will be dealt with by the TFV as well. While this decision is a clear recognition of the important position of victims at the ICC, it disappoints insofar Trial Chamber I emphasized that the principles and method of implementation 'are limited to the circumstances of the present case,' and that the decision 'is not intended to affect the rights of victims to reparations in other cases, whether before the ICC or national, regional or other international bodies.'<sup>21</sup> This suggests that other Chambers may adopt different principles and methods, creating an undesirably fragmented reparations system at the Court. Moreover, the decision set no timetables or deadlines for the TFV, nor did it provide any guidelines or criteria for the TFV to use with respect to how to deal with collective and individual applications from victims.<sup>22</sup> While a newly constituted Trial Chamber will ultimately oversee implementation, it is too soon to gauge how effective and quick the reparations system will be.

Also in the DRC situation, Germain Katanga and Mathieu Ngudjolo Chui are waiting for the final judgment in their case. Closing statements concluded on 23 May 2012, and Trial Chamber II is expected to deliver the trial judgment before the end of 2012.<sup>23</sup> On a different note but related to this case, an Amsterdam court ruled last year that three witnesses who testified in the Katanga and Ngudjolo Chui case at the ICC could apply for asylum in the Netherlands.<sup>24</sup> More recently, on 26 September 2012,

<sup>19</sup> Article 78 of the Rome Statute reads, in relevant part: "1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime."

<sup>20</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision Establishing the Principles and Procedures to be Applied to Reparations, Trial Chamber I, Case No. ICC-01/04-01/06, 7 August 2012.

<sup>21</sup> *Ibidem*, at para. 181.

<sup>22</sup> Contreras-Garduño, D., 'Passing the Buck: ICC Trial Chamber's Approach in Lubanga Reparations Decision', *Armed Groups and International Law*, 15 August 2012, available at: <http://armedgroups-internationalallaw.org/2012/08/15/guest-post-by-diana-contreras-garduno-passing-the-buck-the-icc-trial-chambers-approach-in-lubanga-reparations-decision/> (last visited 9 October 2012).

<sup>23</sup> Easterday, J., 'Katanga and Ngudjolo Protest Cut in Legal Aid', 14 September 2012, available at: [www.katangatrial.org/2012/09/katanga-and-ngudjolo-protest-cuts-in-legal-aid/](http://www.katangatrial.org/2012/09/katanga-and-ngudjolo-protest-cuts-in-legal-aid/) (last visited 5 October 2012).

<sup>24</sup> Rb. 's-Gravenhage (zittingsplaats Amsterdam) 28 December 2011, *LJN* BU9492.

the District Court in The Hague ruled that the three witnesses must be transferred to Dutch custody.<sup>25</sup> The witnesses had been in detention in the DRC before their transfer to the ICC's detention centre in The Hague in May 2011. Once in The Hague, they wanted to apply for asylum in the Netherlands, because they feared for their safety if returned to the DRC. The Dutch Immigration and Naturalisation Service (IND) had initially refused to accept the asylum applications, but will now have to consider their submissions. This development, though, may have far-reaching consequences for the relationship between the ICC and the Netherlands as well as the relationship between the ICC and other countries from which the Court tries to obtain witnesses. If persons detained in other countries are transferred to The Hague in order to testify at the ICC, but are subsequently not returned to the country of origin, countries will likely be less inclined to cooperate with the Court on such matters.

And finally in the DRC situation, the Court issued two new arrest warrants on 13 July 2012. First, with respect to Bosco Ntaganda, the ICC issued a second arrest warrant for him.<sup>26</sup> The first arrest warrant for Ntaganda was issued on 22 August 2006, and charged him with three counts of war crimes allegedly committed in Ituri, namely the enlistment of children under the age of 15, the conscription of children under the age of 15, and using children under the age of 15 to participate actively in hostilities.<sup>27</sup> The new arrest warrant added three counts of crimes against humanity (consisting of murder, rape and sexual slavery, and persecution) as well as four counts of war crimes (consisting of murder, attacks against the civilian population, rape and sexual slavery, and pillaging) to the long list of charges faced by Ntaganda, who remains at large in the DRC.

Second, the Court issued an arrest warrant for Sylvestre Mudacumura on 13 July 2012. Mudacumura, head of the rebel group Democratic Forces for the Liberation of Rwanda, is suspected of committing nine counts of war crimes, from 20 January 2009 to the end of September 2010, in the context of the conflict in the Kivus, in the DRC.<sup>28</sup> Mudacumura remains at large as well.

A case stemming from a different situation at the ICC is moving along slowly. In the Côte d'Ivoire situation, Laurent Gbagbo, the country's former President who was transferred to The Hague on 30 November 2011, was due to appear in Court on 13 August 2012 for the commencement of the confirmation of charges hearing. However, the hearing was postponed, now for the second time, pending a decision on whether Gbagbo is well enough to take part in the proceedings against him.<sup>29</sup> Upon

<sup>25</sup> Rb. 's-Gravenhage (vzr.) 26 September 2012, LJN BX8320.

<sup>26</sup> *Prosecutor v. Bosco Ntaganda*, Decision on the Prosecutor's Application under Article 58, Pre-Trial Chamber II, Case No. ICC-01/04-02/06, 13 July 2012.

<sup>27</sup> *Prosecutor v. Bosco Ntaganda*, Decision on the Prosecution Application for a Warrant of Arrest, Pre-Trial Chamber II, Case No. ICC-01/04-02/06, 22 August 2006.

<sup>28</sup> *Prosecutor v. Sylvestre Mudacumura*, Decision on the Prosecutor's Application under Article 58, Pre-Trial Chamber II, Case No. ICC-01/04-01/12, 13 July 2012.

<sup>29</sup> International Criminal Court, Press Release ICC-CPI-20120803-PR830 (3 August 2012), available at: [www.icc-cpi.int/NR/exeres/87816A9C-BD2C-4C62-8774-0F9A88BA07C4.htm](http://www.icc-cpi.int/NR/exeres/87816A9C-BD2C-4C62-8774-0F9A88BA07C4.htm) (last visited 5 October 2012).

the Defence's request, the Judges appointed medical experts to examine Gbagbo. Medical reports were filed on 19 July 2012, and the Prosecution and the Defence were both given the opportunity to respond. Pre-Trial Chamber I has not yet set a new date for the confirmation of charges hearing, since it will first resolve this issue.

In the Kenya situation, the two related cases against the four accused are steadily moving ahead. The charges were confirmed on 23 January 2012, and both trials are set to start next year in 2013 in the second week of April: the case against William Samoei Ruto and Joshua Arap Sang will start on 10 April 2013, and the case against Francis Kirimi Muthaura and Uhuru Muigai Kenyatta will begin on 11 April 2013.<sup>30</sup>

Currently, the Court is prosecuting 16 cases in 7 situations, while still conducting preliminary examinations in a number of situations, such as Afghanistan, Georgia, Guinea, Colombia, Honduras, Korea and Nigeria. Most recently, the Office of the Prosecutor started a new preliminary investigation into the situation in Mali. The Government of Mali, as a State Party to the ICC, referred the situation in Mali since January 2012 to the Court on 18 July 2012.<sup>31</sup> Violence erupted in Mali around 17 January 2012 when Tuareg rebels attacked Malian soldiers. In March 2012, mutinous soldiers in Mali's capital Bamako overthrew the elected government of President Amadou Toumani Touré, who eventually resigned in April 2012. An interim government, which made the referral to the ICC, seems to have little to no control over the northern part of the country, which is still being controlled by rebel groups.<sup>32</sup>

On a final and practical note, the Court signed a contract for permanent premises in its host country the Netherlands. Construction will commence in 2013, and the new building in The Hague is expected to be finished in 2015.<sup>33</sup>

<sup>30</sup> International Criminal Court, Press Release ICC-CPI-20120709-PR823 (9 July 2012), *available at*: [www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr823](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr823) (last visited 5 October 2012).

<sup>31</sup> International Criminal Court, Press Release ICC-OTP-20120718-PR829 (18 July 2012), *available at*: [www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr829](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr829) (last visited 11 October 2012).

<sup>32</sup> Blackwell, R., 'Mali', *New York Times*, 11 September 2012, *available at*: <http://topics.nytimes.com/top/news/international/countriesandterritories/mali/index.html> (last visited 11 October 2012).

<sup>33</sup> International Criminal Court, Press Release ICC-CPI-20121001-PR840 (1 October 2012), *available at*: [www.icc-cpi.int/NR/exeres/0583E838-94B6-401E-A9BD-45DA64722393.htm](http://www.icc-cpi.int/NR/exeres/0583E838-94B6-401E-A9BD-45DA64722393.htm) (last visited October 2012).